UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets	Docket No. RM19-2-000

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

In its Notice of Proposed Rulemaking ("NOPR"),[1] the Federal Energy Regulatory Commission (the "Commission") proposes to revise its regulations regarding the horizontal market power analysis required of sellers seeking to obtain or retain market-based rate ("MBR") authority. In Regional Transmission Organization or Independent System Operator (collectively referred to as "RTO") markets or submarkets with RTO-administered energy, ancillary services, and capacity markets, MBR sellers would be relieved of the requirement to submit the two horizontal market power indicative screens.[2] In RTOs that lack an RTO-administered capacity market, MBR sellers would be relieved of the indicative screens requirement if their MBR authority is limited to sales of energy and/or ancillary services.[3] In lieu of the indicative screens requirements, the Commission proposes that these MBR sellers would be permitted to state that they are relying on Commission-approved market monitoring and mitigation to address potential

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[1] *Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, 165 FERC ¶ 61,268 (2018).

[2] NOPR P 1

[3] *Id.*

horizontal market power that they may have in those markets.[4] The NOPR also proposes to eliminate the rebuttable presumption that RTO monitoring and mitigation is sufficient to address any horizontal market power concerns for capacity sales in those RTOs that lack a RTO-administered capacity market.[5]

The Transmission Access Policy Study Group ("TAPS") appreciates the opportunity to comment on the NOPR. We also are sympathetic to the Commission's desire to reduce unnecessary administrative burdens on MBR sellers. However, elimination of any element of the market power analysis required under 18 C.F.R. § 35.37 must be consistent with the Commission's statutory obligation to ensure just and reasonable rates. The Commission has long recognized the value of the indicative screens, even where there is Commission-approved RTO monitoring and mitigation measures in place. The indicative screens provide critical seller-specific information and help focus the Commission's other market power protection mechanisms on those MBR sellers that warrant closer scrutiny. At a time of dramatic changes to the nation's generation mix and increasing industry consolidation, the Commission should not reduce its oversight with respect to the potential exercises of market power.

Accordingly, TAPS urges the Commission to:

- Retain the requirement that MBR sellers in RTO regions must submit indicative market power screens.
- Reject the NOPR's tentative conclusion that the elimination of the indicative screens will not give rise to market power concerns with respect to bilateral transactions.

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[4] *Id.* P 43.

[5] *Id.* P 51.

In addition, TAPS appreciates the Commission's efforts to better align the rebuttable presumptions regarding the sufficiency of RTO monitoring and mitigation with its statutory mandate to ensure just and reasonable rates. TAPS therefore supports the Commission's proposal to eliminate the rebuttable presumption that RTO market monitoring and mitigation is sufficient to address horizontal market power concerns regarding capacity sales where the RTO does not have an RTO-administered capacity market.

I. INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities in more than thirty-five states.[6] Because TAPS members rely on transmission facilities owned and controlled by others, TAPS has a vital interest in the proper competitive functioning of wholesale power markets, including the prevention of the exercise of market power in wholesale capacity, energy, and ancillary markets. TAPS members have long been concerned about structural changes in the electric industry that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates and, in particular, those in which the Commission has previously rejected arguments for eliminating the indicative screens requirement in RTOs.[7]

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[6] David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

[7] *See* NOPR PP 17-18 (discussing TAPS comments in response to *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 147 FERC ¶ 61,232, P 76 (2014) ("Order No. 816 NOPR")).

II. COMMUNICATIONS

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III. COMMENTS

A. The Commission should preserve the requirement that all MBR sellers, including those in RTOs, must submit the two horizontal market power indicative screens.

The Commission seeks comment on its proposal to eliminate the requirement that MBR sellers submit the two indicative screens[8] for RTO markets with RTO-administered energy, ancillary services, and capacity markets subject to Commission-approved monitoring and mitigation. It also proposes that for RTOs lacking an RTO-administered capacity market, sellers would be relieved of the indicative screens requirement if their MBR authority is limited to sales of energy and/or ancillary services. In lieu of submitting the indicative screens, the Commission proposes that these sellers would state that they are relying on Commission-approved RTO monitoring and mitigation to address any market power they may have in those markets. This proposal represents a significant and problematic departure from the Commission's regulation of MBR authority.

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[8] 18 C.F.R. § 35.37(c)(1).

In upholding the Commission's general ability to authorize market-based rates, courts have emphasized the Commission's "dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements."[9] For the first of these two requirements, "FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power)."[10] The indicative screens play a central role in this requirement. When the Ninth Circuit upheld Order No. 697, it explained that simply "assum[ing] . . . that sellers lacked market power" violates the Commission's statutory obligation to ensure that rates are just and reasonable.[11] Order No. 697 did not contain this fatal flaw, however, because it "require[d], through a screening process, the collection of empirical data on sellers' market power before it authorizes the filing of market-based rates."[12] Thus, the "rigorous screening process to detect market power"[13] and collection of seller-specific data were critical to the court's upholding of the Commission's MBR program.

For the second requirement, courts have held that post-MBR authorization reporting requirements are necessary to ensure just and reasonable rates. The indicative screens play a role in this second step too. Except for Category 1 Sellers,[14] all MBR

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[9] *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004); *see also Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 919 (9th Cir. 2011) ("By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.").

[10] *Cal. ex rel. Lockyer*, 383 F.3d at 1013.

[11] *Mont. Consumer Counsel*, 659 F.3d at 917 (citing *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

[12] *Id.*

[13] *Id.*

[14] Category 1 Sellers control or are affiliated with 500 MW or less of generation and meet certain other criteria. 18 C.F.R. § 35.36(a)(2). Any MBR seller that is not a Category 1 Seller is a Category 2 Seller. 18 C.F.R. § 35.36(a)(3).

sellers must submit an updated market power analysis, including the indicative screens, every three years.[15] These post-approval reporting requirements are essential because "both [the D.C. Circuit] and the Ninth Circuit have held that FERC violates its oversight duty when it imposes no reporting requirements on generators and instead resorts to 'largely undocumented reliance on market forces as the principal means of rate regulation.'"[16]

The NOPR proposes a marked departure from long-standing precedent concerning the Commission's approach to identifying and preventing the exercise of market power. The Commission has consistently ruled that the indicative screens requirement is necessary for both MBR sellers in non-RTO regions and those in RTOs. When the Commission first adopted the two horizontal market power indicative screens on an interim basis, it rejected arguments that these screens were unnecessary in RTOs. While acknowledging the benefits of RTO monitoring and mitigation, the Commission found that the "indicative screens will provide a further vehicle to check on the potential for market power."[17] A few years later when the Commission codified these two screens

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[15] NOPR P 5 (citing *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 119 FERC ¶ 61,295, P 850 ("Order No. 697"), *clarified*, 121 FERC ¶ 61,260 (2007), *on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055 ("Order No. 697-A"), *clarified*, 124 FERC ¶ 61,055, *on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *on reh'g and clarification*, Order No. 697-C, 127 FERC ¶ 61,284, *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 130 FERC ¶ 61,206, *clarified*, 131 FERC ¶ 61,021 (2010), *reh'g denied*, 134 FERC ¶ 61,046 (2011), *reh'g denied*, 143 FERC ¶ 61,126 (2013), *review denied sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 567 U.S. 934 (2012)).

[16] *Blumenthal v. FERC*, 552 F.3d 875, 882-83 (D.C. Cir. 2009) (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C. Cir. 1984)).

[17] *AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018, P 186 (2004), *order on reh'g*, 108 FERC ¶ 61,026 (2004). On rehearing, the Commission confirmed that "we recognize the benefits of an ISO/RTO that uses appropriate market monitoring and mitigation measures, but believe our indicative screens provide an additional measure to check for the potential of market power." *AEP Power Mktg., Inc.*, 108 FERC at P 175.

in Order No. 697, it confirmed that it "will continue to require generation market power analysis from all sellers, *including those in RTO/ISO markets*."[18] Although it again recognized the additional protections provided by Commission-approved RTO monitoring and mitigation, the Commission stressed that these measures "cannot replace the generation market power analysis."[19] On rehearing, the Commission reaffirmed its conclusion that Commission-approved RTO monitoring and mitigation "cannot replace the horizontal market power analyses which provide the Commission and the industry with critical information regarding the potential market power of sellers in the market."[20] Several years later in Order No. 816, the Commission once again considered and rejected exempting MBR sellers in RTO markets from the indicative screens if they rely on RTO monitoring and mitigation. While the Commission noted that it may again consider this issue in the future,[21] it explained that the Commission "continue[s] to value the information obtained through the indicative screens."[22]

Thus, in the nearly fifteen years since the two indicative screens were adopted, the Commission has repeatedly affirmed the need for these screens even where there are Commission-approved RTO monitoring and mitigation measures. These orders cannot be reconciled with the NOPR's contention that "[g]iven the Commission's previous findings

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[18] Order No. 697, P 290 (emphasis added).

[19] *Id.*

[20] Order No. 697-A, P 109.

[21] *Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 816, 153 FERC ¶ 61,065, P 27 (2015) ("Order No. 816") ("We will transfer the record on this aspect of the NOPR to Docket No. AD16-8-000 for possible consideration in the future as the Commission may deem appropriate"), *on reh'g and clarification*, Order No. 816-A, 155 FERC ¶ 61,188 (2016). A search of the Commission's eLibrary for Docket No. AD16-8-000 returns no results. Thus, it appears that there has been no further development of the record on this issue since the Commission issued Order No. 816.

[22] Order No. 816, P 28.

that RTO/ISO monitoring and mitigation adequately mitigate a seller's market power and the availability of other data regarding horizontal market power, the indicative screens provide marginal additional market power protections."[23]

The proposed elimination of the indicative screens ignores the distinct and essential role the indicative screens play. The indicative screens provide seller-specific information regarding market power, which the Commission has emphasized as a core component of MBR authorizations. In Order No. 697, the Commission held that it was "retain[ing] our approach to determining whether a seller should receive authorization to charge market-based rates, as modified by [Order No. 697], by analyzing *seller specific market power*."[24] The use of such screen information is basic to competition regulation.[25]

Even in those instances where, based on RTO monitoring and mitigation, the Commission has ultimately granted MBR authority despite screen failures, it nevertheless has done so with at least an initial understanding of the degree of potential market power the particular seller may have. The Commission cannot presume that RTO monitoring and mitigation will provide sufficient mitigation unless it first knows what must be mitigated.

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[23] NOPR P 27.

[24] Order No. 697, P 955 (emphasis added); *see also* Order No. 697-A, P 110 (finding that any reduction in administrative burden that would result from an RTO exception to the indicative screens requirement "is outweighed by the additional information gleaned with respect to *a specific seller's* market power) (emphasis added); *Boralex Livermore Falls LP*, 123 FERC ¶ 61,279, P 27 (2008) (noting the Commission's "long-established approach when a seller applies for market-based rate authority of analyzing *seller-specific* market power") (emphasis added) (citing Order No. 697, P 955).

[25] *See, e.g.*, U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* at 3 (Aug. 19, 2010), available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (explaining that increases in market shares and the level of concentration in a relevant market "are presumed to be likely to enhance market power").

In addition to providing the basis for an initial presumption of RTO monitoring and mitigation sufficiency, the information from the indicative screens is instrumental in assessing whether the presumption should be upheld or rebutted in particular instances.[26] The NOPR "recognize[s] that challenging parties would have to provide evidence that a seller had market power before arguing that RTO/ISO mitigation was insufficient to address the seller's alleged market power,"[27] yet proposes to eliminate an important source of such evidence. Replacing the seller-specific information of the indicative screens with a generic assumption that RTO monitoring and mitigation is always sufficient to address any potential market power would be improper and a fundamental shift away from the Commission's approach to market-based rates.

The NOPR suggests that despite the proposed rule, the Commission would retain its ability to ensure that market-based rates are just and reasonable. It emphasizes: (1) the preservation of the other requirements set forth in section 35.37 of the Commission's regulations;[28] (2) the ability of the Commission to require updated market power analysis, including indicative screens, from MBR sellers;[29] (3) the ability of the Commission and affected parties to initiate proceedings under Federal Power Act ("FPA") section 206 against MBR sellers;[30] and (4) the ability of the Commission or affected parties to challenge the rebuttable presumption of the adequacy of Commission-approved RTO

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[26] For instance, particularly in a highly concentrated market, it is possible for consumers to suffer from the exercise of seller-side market power at a level below the triggering of RTO market mitigation measures.

[27] NOPR P 53 n.87.

[28] *Id.* P 61. As noted below, however, the organizational chart requirement is currently stayed.

[29] *Id.* P 46.

[30] *Id.* PP 65, 70.

monitoring and mitigation in specific MBR filings.[31] These other requirements and optional procedures do not justify the elimination of the indicative screens in RTOs.

As an initial matter, each was in place when the Commission previously rejected calls for an RTO exception to the indicative screens. The NOPR identifies no reasoned basis for departing from the Commission's established practice and reducing its oversight over MBR authority at this time. The Commission has not introduced new, additional information requirements that would effectively replace the information collected from the indicative screens. In fact, the Commission has yet to implement all of the other requirements codified in section 35.37 of the Commission's regulations.[32]

It is also problematic for the Commission to rely on its "ability to require . . . indicative screens"[33] in future, unspecified circumstances as a safeguard for dispensing with them as a universal market power authorization and oversight requirement. The Commission cannot rely solely on post-approval reporting and monitoring, particularly when applied to some but not all MBR sellers at the Commission's discretion. Doing so removes the first of the essential "dual requirement[s] of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements."[34]

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[31] *Id.* P 53.

[32] *Id.* P 46 n.81 (stating that "the requirement to submit an organizational chart is currently stayed") (citing Order No. 697-A, P 47)). In addition, the Commission has proposed revising its regulations to collect certain data from MBR sellers in a manner that would be easier to retrieve and analyze through a relational database, but that proposal remains pending. *Data Collection for Analytics and Surveillance and Market-Based Rate Purposes*, 156 FERC ¶ 61,045 (2016).

[33] NOPR P 46.

[34] *Cal. ex rel. Lockyer*, 383 F.3d at 1013; *see also Mont. Consumer Counsel*, 659 F.3d at 919 ("By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.").

The significant changes occurring in the electric industry only increase, not lessen, concerns about market power and the need to retain all of the Commission's tools to prevent its exercise and thereby assure just and reasonable rates. The nation's generation mix is currently undergoing tremendous changes. When the Commission terminated the rulemaking proceeding initiated by the Department of Energy on Grid Reliability and Resilience Pricing, several of the Commissioners highlighted the rapid and dramatic changes to the nation's generation mix.[35] The North American Electric Reliability Corporation ("NERC") has likewise highlighted the significant pace and degree of these changes, explaining that the Bulk Power System ("BPS") "is undergoing a rapid and significant transformation with ongoing retirements of fossil-fired and nuclear capacity, as well as growth in new natural gas, wind, and solar resources. . . . The changing resource mix alters the operating characteristics and constraints of the BPS."[36] Emerging technologies such as electric storage resources and distributed energy resources will only further transform generation mix and grid operations. These changes raise new concerns about how and when market power could be exercised, creating uncertainty as to whether existing Commission-approved RTO market monitoring and mitigation will

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[35] *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018) (then-Commissioner Chatterjee concurring) (noting the "tremendous changes in our generation resource mix" and that "[t]he scale and pace of those changes are staggering"); *id.* (Commissioner LaFleur concurring) ("In the 21st century . . . the pace of technological change in energy has accelerated, resulting in a rapid transformation of the nation's resource mix. . . . With these new technologies have come changes in the location and operation of energy resources, their cost patterns, and the way grid operators plan their systems and deploy resources to keep the lights on.").

[36] NERC, Remarks of John N. Moura, Director Reliability Assessment, and System Analysis, *Reliability Technical Conference*, Docket No. AD18-11-000 (July 31, 2018), eLibrary No. 20180802-4022. The U.S. Energy Information Administration similarly anticipates a "notable shift in fuels used to generate electricity . . . [including] [i]ncreased natural gas-fired electricity generation; larger shares of intermittent renewables; and additional retirements of less economic existing coal and nuclear plants." U.S. Energy Information Administration, *Annual Energy Outlook 2019* at 12 (Jan. 24, 2019), available at https://www.eia.gov/outlooks/aeo/pdf/aeo2019.pdf.

ameliorate these new market power challenges. It would be unwise for the Commission to eliminate the indicative screens requirement and place all of its eggs in one basket by relying solely on RTO monitoring and mitigation that may not be adequate to protect against new market power challenges at this time of fundamental industry transformation.

In addition to technological developments and changes in generation mix, the Commission has noted that the "industry has undergone substantial changes including . . . consolidation among utilities."[37] Whereas there were 238 investor-owned utilities in 1980, this number decreased to below 190 in 2000.[38] Recent years have seen even more drastic consolidation, with approximately 55 investor-owned electric utilities and the same number of investor owned-gas utilities as of 2017.[39] Increased industry consolidation warrants greater oversight over MBR sellers, not less.[40] This is not the time for the Commission to reduce the ability to protect against the exercise of market power by eliminating the indicative screens requirement in RTOs.

Moreover, the efficacy of the other existing MBR requirements and procedural avenues would be undermined by the elimination of the indicative screens. Unlike other reporting requirements, the indicative screens do not just provide information; they also help identify those MBR sellers that warrant greater attention. The screens enable the

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[37] *See Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act*, Notice of Inquiry, 156 FERC ¶ 61,214, P 37 (2016).

[38] William S. Lamb & Michael Didriksen, *Electric and Gas Utility Mergers and Acquisitions: Trends in Deal Terms, Contract Provisions, and Regulatory Matters*, 38 Energy L.J. 133, 133-34 (2017) (citing H. Lee Willis & Lorrin Philipson, *Understanding Electric Utilities and De-Regulation* 91 (CRC Press 2006)), available at https://www.eba-net.org/assets/1/6/21-133-163-Lamb___Didriksen_[FINAL].pdf.

[39] *Id.* (citing S&P Capital IQ/SNL Energy database).

[40] Highly concentrated markets are conducive to anticompetitive cartel behavior such as price-fixing, bid rigging, and agreements to restrict supply. *See In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 361 (3rd Cir. 2004) (concentrated market for standardized product constituted conditions "conducive to collusion").

Commission and affected parties to better direct limited time and resources toward "the subset of applicants who require closer scrutiny,"[41] as opposed to those unlikely to raise horizontal market power concerns. This important tool is lost by the removal of the screens, making it less likely those other requirements and procedures will be effective. Although the Commission and affected parties always have the ability, for instance, to initiate an FPA section 206 proceeding or challenge a particular MBR filing, the indicative screens may well provide key information to determining *when* it may be appropriate to do so.

Likewise, the Commission and others may always scrutinize an MBR seller's asset appendix, but the indicative screens enable them to better understand this information in the contexts of particular markets. This is vital because the asset appendix information is of limited use on its own, particularly in light of the stay of the organizational chart requirement and the lack of a relational database.[42] In contrast, a statement regarding reliance on RTO monitoring and mitigation neither identifies those sellers that presumptively raise no market power concerns nor provides any context in which to analyze other information submitted by the seller.

In addition, the lack of indicative screen information will hinder the ability of affected parties and the Commission to meet the evidentiary burden required to challenge MBR filings. As the NOPR explains, the "challenging party would bear the burden of proof to demonstrate that the seller has market power and that such market power is not addressed by existing Commission-approved RTO/ISO market monitoring and

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[41] *Duke Power*, 109 FERC ¶ 61,270, P 33 (2004).

[42] *See supra* note 32.

mitigation."[43] It is already difficult for the Commission, let alone intervenors, to meet this burden of proof, and eliminating the information from the indicative screens would only exacerbate this. For those MBR sellers that would fail one or both of the indicative screens—the very sellers most likely to raise market power concerns—the proposed rule would shift the burden to intervenors to prove, as a threshold matter, that the seller has market power.[44] Thus, the proposed elimination of the indicative screens would paradoxically increase the importance of Commission and intervenor challenges regarding market power concerns, while at the same time undermine the Commission's and intervenors' ability to bring such challenges. This is all the more reason why the Commission cannot rely on these other avenues as replacements for the ex ante finding of a lack of market power that courts have required.

B. The proposed rule is flawed with respect to its treatment of bilateral transactions.

The NOPR suggests that RTO monitoring and mitigation of RTO energy and capacity markets is sufficient to address market power concerns with respect to bilateral transactions, even though bilateral transactions "are not monitored or mitigated by RTOs/ISOs."[45] This claim is unsupported and inconsistent with the Commission's statutory obligations.

The NOPR assumes that "RTO/ISO day-ahead and real-time energy markets and capacity markets can provide an alternative to bilateral sales, thereby helping to

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[43] NOPR P 53.

[44] The current regulations provide that "[t]here will be a rebuttable presumption that a Seller possesses horizontal market power with respect to sales of energy, capacity, energy imbalance service, generation imbalance service, operating reserve-spinning service, operating reserve-supplemental service, and primary frequency response service if it fails either screen." 18 C.F.R. § 35.37(c)(1).

[45] NOPR P 56.

discipline prices on bilateral contracts for energy and capacity."[46] The NOPR relegates to a footnote the fact that "RTO/ISO energy and capacity markets are *not necessarily a perfect substitute* for bilateral sales, particularly if the bilateral sale is made pursuant to a non-standardized, long-term contract."[47] The non-substitutable nature of these products is critical. The only means by which sales in the RTO-administered markets can "discipline" the prices of bilateral sales is if consumers can substitute one product for another. Here, they cannot. Indeed, bilateral contracts flourish in the marketplace because they provide a distinct product.

When the Commission previously considered eliminating the indicative screens in RTO markets (before correctly concluding that it was inappropriate to do so), it found that "it is unrealistic for franchised public utilities to rely extensively on spot market purchases to serve statutory load obligations."[48] The NOPR makes no claim to the contrary. This flaw is not cured by the NOPR's framing of RTO-administered markets as providing a "benchmark price,"[49] rather than substitute products. There is likewise no basis for assuming that voluntary RTO-administered capacity markets are substitutes for bilateral transactions, especially where Load-Serving Entities rely heavily on bilateral

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[46] *Id.* P 59 (footnote omitted). The NOPR further explains that "[f]orward contracts involve a transaction between a specific buyer and seller, unlike the day-ahead and real-time RTO/ISO energy markets which are bid- and offer-based markets that are centrally cleared," and long-term bilateral contracts are typically "negotiated, tailored contracts between the buyer and seller." *Id.* P 57 & n.88.

[47] *Id.* P 59 n.90 (emphasis added).

[48] *Id.* P 18 n.48 (citing TAPS, Comments, *Refinements to Policies and Procedures for Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. to Pub. Utils.*, Docket No. RM14-14-000 (Sept. 23, 2014), eLibrary No. 20140923-5126 (quoting Order No. 816 NOPR P 76)).

[49] *Id.* P 60.

transactions to meet their resource adequacy requirements, instead of looking to the RTO-administered capacity market for needed capacity.[50]

Nor is it the case that the one-year product sold on mandatory capacity markets is an adequate substitute for long-term bilateral contracts. Again, the NOPR makes no claims to the contrary. Just as a night at an Airbnb is not a substitute for the purchase of a home, the price of a night at an Airbnb does not provide a benchmark against which to compare the price of purchasing a home. Accordingly, spot markets and one-year capacity products do not provide a sufficient benchmark against which to compare prices in the bilateral and forward markets.[51]

The NOPR also suggests that "if RTO/ISO energy (e.g., day-ahead and real-time) markets and capacity markets are competitive, and Commission-approved monitoring and mitigation sufficiently protects against the exercise of market power in these markets, then bilateral markets for the same product should also be competitive."[52] The Commission makes no showing that RTO energy and capacity markets are competitive. In fact, the most recent report of the Independent Market Monitor for PJM found that the "results of the base capacity auction for 2021/2022 were *not competitive* and the related issues need to be addressed."[53] Similarly, a December 2017 Government Accountability

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[50] *See Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,176, P 64 (2018) ("Indeed, the record indicates that most [Load-Serving Entities] buy little or no capacity through [purchasing capacity through MISO's Planning Resource] Auction.").

[51] *See* NOPR P 59 n.90.

[52] *Id.* P 58.

[53] Independent Market Monitor for PJM, 2018 Quarterly State of the Market Report for PJM: January through September 1, *RTO/ISO MMU State of the Mkts. Reports*, Docket No. ZZ18-4-000 (Nov. 8, 2018), eLibrary No. 20181108-5086 (emphasis added); *see also* Independent Market Monitor for PJM, Complaint 2, *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C*, Docket No. EL19-47-000 (Feb. 21, 2019), eLibrary No. 20190221-5281 (Complaint filed by the Independent Market Monitor for PJM alleging that: "An excessive default [market seller offer cap] *prevents effective mitigation of market power*

Office report found that "FERC has not assessed overall capacity market performance . . . [or] taken steps to fully assess and respond to risks to achieving capacity markets' objectives."[54] It recommended several steps the Commission should take in order to, among other things, "increase its opportunities to identify and address potential performance problems" and "have a stronger basis for ensuring these markets are meeting their intended objectives of ensuring that there are adequate resources to meet customers' electricity needs at just and reasonable prices."[55] It also found problems with the quality of data that the Commission publishes and recommended that the Commission take steps to improve data quality in order to "enhance FERC's and Congress's ability to understand trends in the markets and oversee these markets."[56]

A purported reliance on the competitiveness of the RTO markets would be at odds with the premise of the Commission's current approach to MBR authorization, which is that the Commission "is not . . . required to separately analyze the competitiveness of the entire market before permitting participants to charge market-based rates."[57] Courts have upheld this approach only because "before FERC approves an individual seller's use of market-based pricing . . . it must determine that 'the seller and its affiliates do not have, or adequately have mitigated, market power.'"[58] Unless the Commission requires a

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in the PJM Capacity Market. The lack of effective market power mitigation in the capacity market, *where structural market power is endemic*, is unjust and unreasonable") (emphasis added) (footnote omitted).

[54] U.S. Gov't Accountability Off., GAO-18-131, *Electricity Markets: Four Regions Use Capacity Markets to Help Ensure Adequate Resources, but FERC has Not Fully Assessed Their Performance* 36 (2017).

[55] *Id.* at 49-50.

[56] *Id.* at 49.

[57] *Midwest Indep. Transmission Sys. Operator, Inc.*, 127 FERC ¶ 61,054, P 60 (2009) (citing *Blumenthal v. FERC*, 552 F.3d 875 (2009)).

[58] *Blumenthal*, 552 F.3d at 882 (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998)); *see also Mont. Consumer Counsel*, 659 F.3d at 916-17 ("[W]e reject Petitioners' contention that

showing in individual MBR filings that the RTO-administered energy and capacity markets are in fact competitive, there is no basis for assuming that the bilateral markets will also be competitive. Moreover, even if one were to credit the NOPR's contention that competitive auction prices discipline bilateral sales (to some unspecified degree), this reasoning runs directly afoul of the courts' pronouncement that the Commission cannot rely upon market forces as a basis for approving market based rate transactions.[59]

The NOPR's proposal regarding bilateral transactions is a significant departure from Order No. 697. Although that Order generally relied on the Commission's regulatory screening in combination with Commission-approved monitoring and mitigation to support MBR authorization in bilateral markets, it emphasized the ability of "customers or other affected parties [to] argue, in the context of a specific market-based rate application or triennial review, that changed circumstances have rendered such mitigation no longer just, reasonable and not unduly discriminatory."[60] Such challenges are informed by the indicative screens, "which provide the Commission and the industry with critical information regarding the potential market power of sellers in the market."[61]

Without either (1) the critical information obtained from the indicative screens, or (2) Commission-approved monitoring and mitigation of bilateral transactions, there is no basis for assuming that market power will be mitigated with respect to bilateral transactions. RTO monitoring and mitigation in energy and capacity markets are

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FERC has an additional obligation, *beyond screening individual sellers for market power*, to assess the overall competitiveness of the market.") (emphasis added).

[59] *See Cal. ex rel. Lockyer*, 383 F.3d at 1013 (emphasizing that "FERC has affirmed in its presentation before us that it is not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine").

[60] Order No. 697-A, P 115.

[61] *Id.* P 109.

"review[ed] and approve[ed] [by the Commission]. . . on the basis of the specific facts and circumstances prevailing in such markets."[62] Absent the indicative screens requirement for all MBR sellers, the Commission cannot assume that these specific rules ensure just and reasonable rates for other markets not subject to Commission-approved monitoring and mitigation, such as bilateral transactions.[63] Indeed, the Commission's proposal to eliminate the presumption that RTO monitoring and mitigation is sufficient to mitigate market power with respect to capacity sales in RTOs with no Commission-approved capacity market monitoring and mitigation measures (discussed in greater detail below) appears to correctly recognize that such presumptions can only be appropriate with respect those markets with Commission-approved RTO monitoring and mitigation.

C. The Commission should adopt the NOPR's proposal to eliminate the rebuttable presumption that RTO market monitoring and mitigation is sufficient with respect to capacity sales where there are no RTO-administered capacity markets.

The Commission seeks comment on the proposal that the indicative screens requirement be retained for MBR sellers studying RTO markets that do not include RTO-administered capacity markets, unless such sellers are only making energy and/or ancillary service sales.[64] The NOPR also proposes that "that indicative screen failures in RTO/ISO markets that do not have RTO/ISO-administered capacity markets (currently, CAISO and SPP) will no longer be presumed to be adequately addressed by RTO/ISO market monitoring and mitigation."[65] The Commission should adopt both of these

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[62] *Id.* P 115.

[63] *See* NOPR P 56 ("[Bilateral] transactions are not monitored or mitigated by RTOs/ISOs.").

[64] *Id.* P 41.

[65] *Id.* P 51.

proposals. As explained above, the Commission should retain the indicative screens requirement in all RTOs. But because there is no basis for presuming the sufficiency of monitoring and mitigation absent Commission-approval of particular measures for the specific market, the indicative screens are especially important for capacity sales in RTOs that do not administer a capacity market.

The Commission is correct that "monitoring and mitigation of energy prices in day-ahead and real-time markets does not ensure that capacity prices will be just and reasonable."[66] Moreover, the only reason the Commission may presume that that RTO market monitoring and mitigation is sufficient to mitigate market power in RTO-administered markets is that "existing RTO/ISO mitigation has been found to be just and reasonable by the Commission in the context of a proceeding specific to a particular RTO/ISO and involving all of its stakeholders."[67] But where there is no RTO-administered capacity market, there are no Commission-approved RTO capacity market monitoring and mitigation measures.[68] Thus, there has been no inquiry or determination by the Commission to ensure that capacity sales at market-based rates in such markets will be just and reasonable. In order to fulfill its statutory mandate, the Commission must require these sellers to submit the indicative screens, and if one or both screen is failed, present alternative evidence of a lack of horizontal market power or other mitigation for capacity sales in these markets.

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[66] *Id.* P 50.

[67] Order No. 697-A, P 111.

[68] *Cf Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,175, PP 31, 35 (2008) (describing the specific "Commission-approved installed capacity market mitigation measures" that the MBR seller's generation units would be subject to under the NYISO Market Mitigations Plan, which the Commission found sufficient to address market power concerns).

Finally, the Commission rightly recognizes that while there "is state regulatory oversight of the capacity costs and/or prices incurred in CAISO and SPP,"[69] it would still be inappropriate to exempt MBR sellers in these RTOs from the indicative screens. The Commission cannot delegate its statutory responsibility of ensuring just and reasonable rates to other entities, including state commissions.[70] Thus, absent market monitoring and mitigation measures for the particular market in question that have been approved by the Commission itself, there is no basis for either exempting sellers from the indicative screens or assuming that market power has been mitigated.

CONCLUSION

For the reasons set forth above, the Commission should (1) decline, as it has consistently done previously, to establish an RTO exemption from the indicative screens requirement; (2) reject the tentative conclusion that the elimination of the indicative screens for RTOs will not give rise to market power concerns with respect to bilateral transactions; and (3) adopt the proposal in the NOPR to remove the rebuttable presumption that, for those RTOs lacking an RTO-administered capacity market, RTO monitoring and mitigation is sufficient to address horizontal market power concerns for capacity sales where there are indicative screen failures.

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[69] NOPR P 50.

[70] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (holding that "federal agency officials . . . may not subdelegate to outside entities— private or sovereign— absent affirmative evidence of authority to do so" and emphasizing that "[t]he fact that subdelegation in this case is to state commissions rather than private organizations does not alter this analysis").

Respectfully submitted,

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